DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 01-0224
Motor Carrier
For Tax Period 1998-2000

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ISSUES

I. Motor Carrier—Overweight Vehicle Permits

Authority: Black Beauty Trucking, Inc. v. Indiana Department of State Revenue, 527 N.E.2d 1163, 1165 (Ind. Tax 1988); IC 6-8.1-1-1; IC 6-8.1-4-4; IC 8.1-5-1; IC 6-8.1-5-4; IC 9-13-2-121; IC 9-20-1-1; IC 9-20-1-2; IC 9-20-4-1; IC 9-20-4-3; IC 9-20-6-1

Taxpayer protests imposition of fees for overweight vehicle permits.

II. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; 45 IAC 15-11-2

Taxpayer protests imposition of a ten percent (10%) negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer ships steel for steel industry customers. The Indiana Department of Revenue ("Department") determined that taxpayer had not purchased a sufficient number of overweight trip permits for overweight loads it shipped for its customers. The Department issued proposed assessments for the permit fees, a ten percent negligence penalty and interest. Taxpayer protests the imposition of fees, penalty and interest. Further facts will be provided as necessary.

I. Motor Carrier—Overweight Vehicle Permits

DISCUSSION

Taxpayer protests the imposition of fees for oversized and overweight permits for trucks carrying overweight loads. The Department reviewed taxpayer's records and taxpayer's customer's records and determined that taxpayer should have purchased overweight trucking permits for some loads it was carrying for its customer. The Department issued proposed assessments for

the permit fees as well as penalties and interest. Taxpayer protests that the assessments are not valid.

Taxpayer's first point of protest is that the Department is not authorized to audit and assess it for overweight permit fees, penalties and interest, and that no statute or regulation affords feepayers notice of what records they should maintain for an audit with which they will be able to defend themselves in the event of an assessment. Taxpayer believes that the Department based its audit and assessment powers on IC 6-8.1-1-1, but that IC 6-8.1-1-1 only contains vague references to the fees and penalties assessed for overweight vehicles. IC 6-8.1-1-1 states:

> "Listed taxes" or "taxes" includes only the pari-mutuel taxes (IC 4-31-9-3 through IC 4-31-9-5); the riverboat admissions tax (IC 4-33-12); the riverboat wagering tax (IC 4-33-13); the gross income tax (IC 6-2.1) (repealed); the utility receipts tax (IC 6-2.3); the state gross retail and use taxes (IC 6-2.5); the adjusted gross income tax (IC 6-3); the supplemental net income tax (IC 6-3-8) (repealed); the county adjusted gross income tax (IC 6-3.5-1.1); the county option income tax (IC 6-3.5-6); the county economic development income tax (IC 6-3.5-7); the municipal option income tax (IC 6-3.5-8); the auto rental excise tax (IC 6-6-9); the financial institutions tax (IC 6-5.5); the gasoline tax (IC 6-6-1.1); the alternative fuel permit fee (IC 6-6-2.1); the special fuel tax (IC 6-6-2.5); the motor carrier fuel tax (IC 6-6-4.1); a motor fuel tax collected under a reciprocal agreement under IC 6-8.1-3; the motor vehicle excise tax (IC 6-6-5); the commercial vehicle excise tax (IC 6-6-5.5); the hazardous waste disposal tax (IC 6-6-6.6); the cigarette tax (IC 6-7-1); the beer excise tax (IC 7.1-4-2); the liquor excise tax (IC 7.1-4-3); the wine excise tax (IC 7.1-4-4); the hard cider excise tax (IC 7.1-4-4.5); the malt excise tax (IC 7.1-4-5); the petroleum severance tax (IC 6-8-1); the various innkeeper's taxes (IC 6-9); the various county food and beverage taxes (IC 6-9); the county admissions tax (IC 6-9-13 and IC 6-9-28); the oil inspection fee (IC 16-44-2); the emergency and hazardous chemical inventory form fee (IC 6-6-10); the penalties assessed for oversize vehicles (IC 9-20-3 and IC 9-30); *the fees and penalties assessed for overweight vehicles (IC 9-20-4 and IC 9-30)*; the underground storage tank fee (IC 13-23); the solid waste management fee (IC 13-20-22); and any other tax or fee that the department is required to collect or administer.
> (Emphasis added.)

Taxpayer believes that "the fees and penalties assessed for overweight vehicles" language is vague and that the reference to IC 9-20-4 and IC 9-30 limits the scope of IC 6-8.1-1-1. Taxpayer claims that no provision of IC 9-20-4 establishes any sort of fee system for overweight vehicles. Also, taxpayer states that the only penalty provision in IC 9-20-4 is found in IC 9-20-4-3, which states:

> (a) The gross weight declared by an applicant in an application for registration under this title determines and fixes the limit of the load, including the unladen weight of the vehicle or combination of vehicles fully equipped for service, that may be transported by a vehicle or combination of vehicles on the highways for

> the period for which the registration or license is granted. Except as provided in subsection (b), the transportation of a load on a registered and licensed vehicle or combination of vehicles in excess of the limit fixed in the application for registration subjects the person violating a provision of this title to the penalty provisions in this title or to the revocation of the license for the vehicle, or both.
>
> (b) Because of the various types of scales used and the variance in scale weights, a penalty may not be assessed if the actual scale weight of a vehicle or combination of vehicles with load does not exceed one and one-half percent (1 1/2%) of the registered weight of the vehicle or combination of vehicles, including load.
>
> (c) A person who violates this section commits a Class C infraction. In addition, the person shall pay the difference between the fee paid for registration of the vehicle and the fee for the registration of the vehicle plus a maximum load of a weight equal to the excess load being transported. Until the fee is paid, the person transporting the excess load is not permitted to move the transporting vehicle.

The Department refers to IC 6-8.1-4-4, which states:

> (a) The department shall establish a registration center to service owners of commercial motor vehicles.
>
> (b) The registration center is under the supervision of the department through the motor carrier services division.
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> (c) An owner or operator of a commercial motor vehicle may apply to the registration center for the following:
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> (1) Vehicle registration (IC 9-18).
>
> (2) Motor carrier fuel tax annual permit.
>
> (3) Proportional use credit certificate (IC 6-6-4.1-4.7).
>
> (4) Certificate of operating authority.
>
> (5) Oversize vehicle permit (IC 9-20-3).
>
> (6) Overweight vehicle permit (IC 9-20-4).
>
> (7) Payment of the commercial vehicle excise tax imposed under IC 6-6-5.5.
>
> (d) Funding for the development and operation of the registration center shall be taken from the motor carrier regulation fund (IC 8-2.1-23-1).
>
> (e) The department shall recommend to the general assembly other functions that the registration center may perform.

Next the Department refers back to IC 6-8.1-1-1, which states in relevant part:

> “Listed taxes” or “taxes” includes
>
> …
>
> the fees and penalties assessed for overweight vehicles (IC 9-20-4 and IC 9-30)
>
> …
>
> and any other tax or fee that the department is required to collect or administer.

Since IC 6-8.1-4-4 states that the Department shall establish a registration center to service owners of commercial motor vehicles, including overweight vehicle permits, the Department is required to collect or administer the overweight vehicle permit fees. According to IC 6-8.1-1-1, this fee that the Department is required to collect or administer is a listed tax. The Department has authority to audit taxpayers and issue assessments of a "listed tax".

Also, taxpayer protests that there is no statute or regulation that explains what records it should keep since there is no return filed for the permit fees. The Department refers to IC 6-8.1-5-4, which states:

> (a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.
> (b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person filed:
> (1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or
> (2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.
>
> In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.
> (c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.
> (d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

As previously explained, taxpayer is subject to a listed tax since the overweight permit fee is a listed tax under IC 6-8.1-1-1. IC 6-8.1-5-4(a) explains that such a person must keep all source documents so that the department can determine the existence and size of a tax liability. IC 6-8.1-5-4(b)(2) explains that a taxpayer must keep such documents for a period of three years after the due date of such a tax.

Taxpayer's second point of protest is that the forty-two dollar and fifty cent ($42.50) overweight permit fee may be a flat tax, and as such may be unconstitutional. Taxpayer refers to the Indiana Tax Court's decision regarding a Supplemental Highway User fee (SHU) in Black Beauty Trucking, in which the court explained:

> The SHU is a flat tax unapportioned to actual use of the highways, indistinguishable from Pennsylvania's tax. It fails the internal consistency test because if each state applied a flat tax of this type, i.e., $50 per commercial vehicle passing through its jurisdiction, an impermissible interference with free

> trade would result. The interstate carrier traveling from New York to Los Angeles through Indiana covers only a fraction of the miles traveled by an Indiana intrastate carrier, yet both pay the same tax. Furthermore, the interstate carrier my be subject to another flat tax in every other state, regardless of whether the miles traveled in a particular state amount to ten or ten thousand. At year's end, the interstate carrier and intrastate carrier might show the same mileage, but the interstate carrier would have paid as much as forty-eight times the tax paid by the intrastate carrier. The discriminatory impact on the interstate carrier is readily apparent.
> Black Beauty Trucking, Inc. v. Indiana Department of State Revenue, 527 N.E.2d 1163, 1165 (Ind. Tax 1988)

Taxpayer believes that the overweight permit fee at issue in the instant case could result in a similar advantage for an intrastate carrier. The overweight permit fee at issue covers only one trip and the permit is good for only one twenty-four (24) hour period, unlike the annual Supplemental Highway User fee discussed in Black Beauty Trucking. Whereas the intrastate trucking company would have an entire year to get additional value from an annual fee, any trucking company has only 24 hours to use the overweight permit. Even then, once a trip is completed, anyone wanting to take another overweight load will need to pay for a new permit. Unlike the annual SHU fee, here there is no advantage for an in-state trucking company over an out-of-state trucking company, and so the decision in Black Beauty Trucking does not support taxpayer's position.

Taxpayer's third point of protest is that it was a broker rather than a transporter. Taxpayer explained that while it was listed as a carrier on its customer's transport agreements, and taxpayer's Director of Sales and Marketing signed them on taxpayer's behalf, those agreements were standard forms that the customer presented to anyone it was doing shipping with and taxpayer had no other forms to choose from. Also, taxpayer states that its employee on-site at its customer's business only organized and dispatched loads, with no personal observation of the actual loading operations. Taxpayer believes that, since it did not own the trucks doing the hauling, it was not responsible for paying the permit fee. Taxpayer refers to IC 9-20-1-1, which states:

> Except as otherwise provided in this article, a person, including a transport operator, may not operate or move upon a highway in Indiana a vehicle or combination of vehicles of a size or weight exceeding the limitations provided in this article.

Taxpayer also refers to IC 9-20-1-2, which states:

> Except as otherwise provided in this article, an owner of a vehicle may not cause or knowingly permit to be operated or moved upon a highway in Indiana a vehicle or combination of vehicles of a size or weight exceeding the limitations provided in this article.

Taxpayer also refers to IC 9-20-4-1(a), which states in part:

> Except as provided in subsections (b) and (c), a person may not operate or cause to be operated upon an Indiana highway a vehicle or combination of vehicles having weight in excess of one (1) or more of the following limitations:
> …

Taxpayer also refers to IC 9-13-2-121(a), which states:

> (a) "Owner" means, except as otherwise provided in this section, when used in reference to a motor vehicle:
> (1) a person who holds the legal title of a motor vehicle;
> (2) a person renting or leasing a motor vehicle and having exclusive use of the motor vehicle for more than thirty (30) days; or
> (3) if a motor vehicle is the subject of an agreement for the conditional sale or lease vested in the conditional vendee or lessee, or in the event the mortgagor, with the right of purchase upon the performance of the conditions stated in the agreement and with an immediate right of possession of a vehicle is entitled to possession, the conditional vendee or lessee or mortgagor.

Taxpayer reads these statutes collectively to mean that only a vehicle driver, the legal title holder or a motor carrier leasing the vehicle exclusively for more than thirty (30) days is responsible for purchasing the overweight permit. Since taxpayer leased the vehicles for single trips of less than 30 days, taxpayer believes that it does not qualify as an owner of the vehicles and therefore is not responsible for purchasing overweight permits for the vehicles which made the trips in question.

IC 9-20-4-1 does not mention IC 9-20-1-1 or IC 9-20-1-2, and taxpayer provides no analysis of why IC 9-20-4-1 should be limited in such a manner by the provisions of IC 9-20-1-1 and IC 9-20-1-2. IC 9-20-1-1 and IC 9-20-1-2 both describe duties of individuals regarding overweight trucks, but neither statute states that only those individuals are eligible or responsible to purchase overweight permits. In fact, both contain the phrase, "Except as otherwise provided in this article…", which plainly means that even those two statutes for individuals regarding overweight trucks have exceptions and are not all-encompassing.

The Department notes that one of the exceptions referred to in IC 9-20-4-1(a), which provides that a person may not operate or *cause to be operated* upon an Indiana highway a vehicle or combination of vehicles having excess weight is IC 9-20-4-1(b), which states:

> (b) The enforcement of weight limits under this section is subject to the following:
> (1) It is lawful to operate within the scope of a permit, under weight limitations established by the Indiana department of transportation and in effect on July 1, 1956, as provided in IC 9-20-6.

Next, the Department refers to IC 9-20-6-1(a)(1), which states:

> (a) This chapter applies to the issuance of the following permits:
> (1) A permit for the transportation of oversized or overweight vehicles and loads under section 2 of this chapter.

Therefore, reading IC 9-20-4-1(a), IC 9-20-4-1(b) and IC 9-20-6-1(a)(1) together, a person who causes an overweight load to be transported may purchase the permit to do so. The owner of the truck is not the only one able to purchase an overweight permit. Since taxpayer caused the trucks to operate with overweight loads either by owning or hiring them, taxpayer may be held responsible for purchase of the permits.

Taxpayer's fourth point of protest is that it charged its customer an amount less than the cost of the overweight permit load fee itself, and taxpayer would lose money on each load if it were responsible for the overweight fee. Taxpayer submits that this would be an illogical arrangement. Taxpayer does not refer to any statute, regulation or court decision to explain why this is relevant. Here, the Department is only concerned with its duty to collect overweight permit fees. The Department is not concerned with the profitability of a taxpayer's business.

Taxpayer's fifth point of protest is that the Department's calculations were based on documents provided by taxpayer's customer, and that those documents indicate that some trucks were listed as making multiple overweight trips in a single day. The documents upon which the Department relied listed: Carrier code, Ship date, Company code, Bill of lading number, Origin city, Destination city, State for destination city, Weight of load hauled for this shipment, Dollar amount paid for services for hauling and the Carrier vehicle number for load. Taxpayer states that the beginning and ending points of these trips are physically too far apart to allow the number of trips listed to have been completed in a single day by a single truck. Taxpayer believes that the listing of these trucks as making more trips than possible in a day brings into question the Department's assessments which were based on those listings.

The Department based the proposed assessments on the best information available to it. The relevant statute is IC 6-8.1-5-1(a), which states:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department notes that each load listed in the customer's records indicate a different load weight and cost. Elsewhere in its protest, taxpayer made the point that its customer did not tailor each document to individual companies it was doing business with. It appears that taxpayer's customer operated in a similar fashion here, paying more attention to the information it considered important (weight, cost, carrier) and less attention to the information it did not consider as important (truck identifying number). Despite the repetition of truck numbers, all

other information on taxpayer's customer's records is nonrepetitive and it is reasonable for the Department to believe that taxpayer did not report the proper amount of tax (permit fees) due.

Additionally, taxpayer has not provided sufficient documentation verifying its position that the recorded trips were impossible to make in the recorded time. IC 6-8.1-5-1(b) provides in relevant part that the Department's notice of proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid and that the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. Taxpayer has not met this burden.

In conclusion, regarding taxpayer's first point of protest, the Department is authorized to administer the overweight trucking permits and fees. Second, the permit fee is not a flat tax and there is no advantage for in-state trucking firms over out-of-state firms, unlike the situation in Black Beauty Trucking. Third, the permits are not the sole responsibility of truck owners, but also of anyone who causes overweight loads to be transported. Fourth, the Department is charged with collecting overweight permit fees, and it is irrelevant if someone who owes a fee makes a profit or loss in its business. Fifth, the Department based its proposed assessments on the best information available to it, and it is reasonable for it to believe that the permit fees at issue were not properly paid. Taxpayer has not proven the proposed assessments wrong.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Interest and Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of interest and a ten percent (10%) negligence penalty. The Department refers to IC 6-8.1-10-1(e), which states, "Except as provided by IC 6-8.1-5-2(e)(2), the department may not waive the interest imposed under this section." Therefore, the Department may not waive interest.

Taxpayer also protests the imposition of a ten percent negligence penalty. The relevant statute is IC 6-8.1-10-1(a), which states:

> If a person:
> (1) fails to file a return for any of the listed taxes;
> (2) fails to pay the full amount of tax shown on the person's tax return on or before the due date for the return payment;
> (3) *incurs, upon examination by the department, a deficiency that is due to negligence*;
> (4) fails to timely remit any tax held in trust for the state; or
> (5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not

> received by the department by the due date in funds acceptable to the department;
> the person is subject to a penalty.
> (Emphasis added)

Negligence is described in 45 IAC 15-11-2(b), which states:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Since taxpayer failed to pay all fees it was required to pay, taxpayer demonstrated carelessness, thoughtlessness, disregard or inattention to its duties placed upon it by the Indiana Code or department regulations. Therefore, taxpayer was negligent under 45 IAC 15-11-2(b). Taxpayer incurred, upon examination by the department, a deficiency that is due to negligence, and so is subject to a penalty under IC 6-8.1-10-1(a)(3).

FINDING

Taxpayer's protest is denied.

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